No. 82-461

In the Supreme Court of the United States

October Term, 1982

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS, and ROBERT ANDERSON and BETTY ANDERSON, individually, and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770, and 770A,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTION PRESENTED

Is a state court in a class action prohibited by basic principles of federalism and the Due Process Clause of the Fourteenth Amendment from exercising jurisdiction over class members and their claims where (1) the class members are non-residents who have had no contacts with the forum state (2) the class members have not affirmatively consented to its jurisdiction and (3) the claims, in which the forum state has no significant interest, arose entirely in other states.

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No.

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PHILLIPS PETROLEUM COMPANY,
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KEATON G. DUCKWORTH, District Judge, 26th Judicial District, IRL SHUTTS, and ROBERT ANDERSON and BETTY ANDERSON, individually, and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds or royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770, and 770A,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner Phillips Petroleum Company[1] prays that a writ of certiorari issue to review an order and judgment of the Supreme Court of Kansas entered in these proceedings on June 28, 1982.

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1. Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix hereto at page A59.

OPINIONS BELOW

The unpublished order of the Supreme Court of Kansas is set forth at page A1 of the Appendix hereto. The unpublished order of the District Court of Seward County, Kansas is set forth at page A2 of the Appendix hereto.

JURISDICTION

The order of the Supreme Court of Kansas was entered on June 28, 1982, and this Petition for a Writ of Certiorari was filed within 90 days of that date. No petition for rehearing was filed below. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The statutory provision involved is Kansas Statutes Annotated, Section 60-223 which is set forth at page A54 of the Appendix hereto.

STATEMENT OF THE CASE

Petitioner Phillips Petroleum Company (Phillips), a Delaware corporation with its principal place of business in Oklahoma, was engaged in the production and purchase of natural gas under oil and gas leases covering lands located in twelve (12) states throughout the nation rang-

ing from Texas to Wyoming and from West Virginia to Utah. See App. A42-A44. Phillips also sold the gas to various pipeline companies for transportation and resale in interstate commerce and thus the sale price was federally regulated by the Federal Power Commission (FPC).

Under FPC regulation Phillips as a natural gas company was required to obtain FPC approval of price increases for gas sales but, pending final approval of such increases, was permitted to collect the higher prices subject to refund to the purchasing pipeline companies if all or any part of the price increases were not approved by the FPC. After final approval of a gas price increase Phillips would pay to royalty owners additional royalties computed by reference to the increased price pursuant to the various contractual relationships with the royalty owners.

During the period December 30, 1975, through July 1, 1980, Phillips paid out additional royalties to the class plaintiffs by virtue of FPC Opinions 699, 749, and 770 which approved certain price increases sought by Phillips. Payment of the additional royalties had been suspended pending final resolution of the court challenges to the three FPC opinions. In this suit three named royalty owners seek to recover on behalf of all royalty owners interest on the additional royalties paid by Phillips which interest is alleged to have accrued between the time that the higher prices were collected by Phillips and the time at which the additional royalties were paid by Phillips. One of these named class representatives, Irl Shutts, is a resident of Kansas, the other two are residents of Oklahoma.

Phillips moved to dismiss the claims of non-resident plaintiff class members on the ground that the state trial court could not constitutionally exercise jurisdiction over

these claims. (See Phillips' Answer, Pre-Trial Motion and Counterclaim, App. A45). The trial court, on May 21, 1982, overruled the Motion To Dismiss and certified a nationwide class of over 34,000 plaintiffs. (App. A2).

Phillips then sought relief by way of an original mandamus action in the Supreme Court of Kansas. On June 15, 1982, Phillips filed its Petition for Order of Mandamus (App. A10) accompanied by its Memorandum in support thereof. (App. A15). Again Phillips argued that the trial court's certification of a nationwide class, which included claims of non-residents who had no connection whatever to the State of Kansas, violated the Due Process Clause of the Fourteenth Amendment and ignored fundamental principles of federalism. On June 28, 1982, the Supreme Court of Kansas denied, without opinion, the Petition for Order of Mandamus. (App. A1).

The class certified consists of royalty and overriding royalty interest owners residing in all 50 states and in several foreign countries. (App. A43-A44). Less than 2.7% of the class members are residents of Kansas. Less than one-quarter of one percent of the leases which generated the additional royalties are located in Kansas. (App. A42). Texas has a great interest in this litigation since both a majority of the properties generating the additional royalties, and a majority of the owners receiving next largest percentage of both royalty owners and lease interests. Of the $11.3 million paid in additional royalties under these three opinions, Texas residents received approximately $4.7 million. Oklahoma residents received $1.3 million. Kansas residents received approximately $123,000. The Kansas interest obviously is insubstantial when compared to that of these two states. (App. A43-A44).

The sole issue in this proceeding is whether the trial court's action, approved by the Kansas Supreme Court,

is an unconstitutional exercise of jurisdiction, violating the Due Process Clause of the Fourteenth Amendment and fundamental principles of federalism.

REASONS FOR GRANTING THE WRIT

1. The Reasons Stated By The Gillette Company In Support Of Its Petition For A Writ Of Certiorari Support Granting A Writ In This Case.

The United States Supreme Court, on April 5, 1982, granted certiorari in the *Gillette Company v. Miner*, ... U.S. ....., 102 S.Ct. 1767 (1982). That case also involves the question of the propriety of a state court's exercise of jurisdiction over a nationwide class. The reasons for granting a writ stated by the petitioners in *Gillette* are applicable with equal or greater force to the present case.

As noted by the petitioners in *Gillette*, the answer to the question of whether a state court has jurisdiction to make binding on unnamed non-resident plaintiffs a judgment rendered in a plaintiff class action is a matter of conflict between the states. The Kansas Supreme Court in *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978)[2] held no constitutional rights were invaded if procedural due process was accorded to unnamed class members,

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2. *Shutts* was an earlier lawsuit involving this defendant and one of the present plaintiffs. Involved in that action were additional royalties paid following an earlier FPC rate opinion applicable to the Hugoton-Anadarko rate area. In that action the plaintiff was allowed to act as class representative for all royalty owners who received additional royalties under the earlier opinion. The Kansas Supreme Court held that Kansas had a legitimate interest in that litigation because Kansas comprised the largest physical portion of the Hugoton-Anadarko rate making area. 222 Kan. at 557, 567 P.2d at 1314-15. Since the FPC orders involved in the present case are nationwide orders, not even this affiliating circumstance is present.

no matter how attenuated the nexus between the forum and the absent parties.[3] This holding is in substantial accord with later decisions in *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978), and *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, ... U.S. ....., 102 S.Ct. 1767 (1982).

The decision below conflicts with *Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976), and *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976).

The conflict between the state decisions creates the situation in which a decision rendered for Phillips in Kansas would appear to be unenforceable in Pennsylvania and New Jersey. The unsettled law renders unclear whether a judgment in the Kansas action would be accepted as binding by the Texas or Oklahoma courts.[4] Both of these states have by far a greater interest in the litigation than does Kansas. The conflicting approaches to the due process requirements adopted by the different state courts raises the specter of forum shopping by non-resident plaintiffs.[5] The unfairness created by this uncertainty is even more manifest in the present case. A judgment rendered against Phillips would undoubtedly be enforced by the Kansas Courts and by the named plaintiffs on behalf of all the unnamed class members. Whether

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3. The Kansas class action statute, Kan. Stat. Ann. Sec. 60-223(b)(3) uses the opt-out type of system.

4. Oklahoma has an opt-in scheme for joining class plaintiffs. Okla. Stat. Ann. tit. 12, Sec. 14. In view of Oklahoma's legislative position, it is questionable whether Oklahoma will accept the constitutionality of the Kansas class action type of system.

5. Betty and Robert Anderson, residents of Oklahoma, originally brought a virtually identical class action suit in an Oklahoma State District Court but dismissed that suit to join with Irl Shutts as plaintiffs in the Kansas action.

a judgment in Phillips' favor would bind unnamed class members, however, would be subject to litigation in any foreign forum in any later action brought by a dissatisfied class member.

Moreover, the exercise of jurisdiction over unnamed non-resident plaintiffs is not in accord with recent decisions by this Court. In *Rush v. Savchuk*, 444 U.S. 320, 327 (1980), the Court again stated that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny . . ." *quoting Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).[6] This requirement is "a consequence of territorial limitations on the powers of the respective states," which is "imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92, 294 (1980). The Kansas Supreme Court is placed in a position of deciding unresolved issues of foreign law, or applying law contrary to the forum's own law, in this case in which it has little interest. The due process clause, acting as an instrument of federalism and acting to insure "orderly administration of the laws," should prevent that result. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).[7]

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6. The drafters of the Uniform Class Action Act have recognized that the due process requirements are applicable to unnamed plaintiff class members as well as defendants. See Section 6, Uniform Class Action Act, App. A57.

7. In prior similar actions, Kansas has purported to apply the law of the state in which the lease is located. Of the 12 states involved in this dispute, however, only two states, Kansas and Texas have direct rulings on the issue of entitlement to interest. Even those states disagree about the basis for allowance of interests, possible defenses, and the rate of interest to which the claimants might be entitled. *Compare Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978) (contract provides basis) *with Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977) ("equitable principles" pro-

(Continued on following page)

The approach of the Kansas Court in holding that no minimum contacts are required, see *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 542, 567 P.2d 1292, 1305 (1977), is directly contrary to the position adopted by the United States Supreme Court. The Kansas Court's holding ignores the balance between the courts of coequal sovereign states inherent in the constitution and recognized by this Court. In the present case Kansas has no legitimate interest in resolving the underlying litigation on a nationwide scale. Less than 2.7% of the individuals affected are residents of Kansas, and they receive less than 1.9% of the additional royalties paid by Phillips pursuant to these three opinions. (App. A43-A44).

There clearly are other jurisdictions substantially more interested in the outcome of the litigation than Kansas. Texas is the situs of the majority of properties involved and the residence of the majority of the individuals involved. Oklahoma is second in the number of leases and resident royalty owners. Oklahoma also is the residence of two of the named plaintiffs and the principal place of business of the defendant. Clearly, either of these available forums would possess a greater interest in the resolution of the current dispute. Certifying a class, without requiring a nexus between the litigation and the forum undermines the ability of these other states to regulate transactions within their borders and usurps the authority of these other, more interested jurisdictions.

Footnote continued—

vide basis) *compare Exxon Corp. v. Middleton*, 613 S.W.2d 240 (Tex. 1981) (division order controls) *with Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977) (division order ineffective), and *compare Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978) (statutory rate of interest applies) *with Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977) (court need not use statutory rate). The other interested states have not definitively ruled on the existence or exact parameters of the cause of action asserted on behalf of the unnamed plaintiffs.

Jurisdiction over the non-resident plaintiffs cannot be based on their receiving notice of class action and failing to opt out of the action. Pursuant to Kan. Stat. Ann. Sec. 60-223(b)(3) to avoid the effect of a judgment in a class action, the plaintiff must affirmatively seek to avoid the jurisdiction of the Court. A state which does not have power to compel a non-resident to submit to its jurisdiction cannot logically have power to compel that non-resident to take affirmative action to avoid its jurisdiction.[8] It is recognized that while the actions of an individual may result in a Court assuming jurisdiction, "a court cannot conclude all persons interested by its mere assertion of its own power . . . ." *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 29 (1917).[9] Indeed the Court has repeatedly held that the acts of one seeking to bring another within a court's power are not constitutionally sufficient. The "unilateral activity of those who claim some relationship with a non-resident" cannot satisfy the requirements of due process. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *World-Wide Volkswagen v. Woodson*, 444 U.S. at 298.

If jurisdiction over non-residents can be invoked by the satisfaction of the procedural due process minimum of appropriate notice, without more, courts of any one state at any time could extend their reach into the lives of citizens of any other state.

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8. The Kansas opt-out method which gives rise to these constructional deficiencies, should be contrasted to the opt-in method utilized in the Oklahoma statutes. Okla. Stat. Ann. tit. 12, Sec. 14. Under this system the non-resident plaintiff must unmistakably manifest an assent to the exercise of jurisdiction by the forum.

9. See, *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, ... U.S. ....., 50 U.S.L.W. 4553 (June 1, 1982), in which a defendant raised the defense of lack of personal jurisdiction and then refused to allow discovery as to its merits. This should be contrasted to the present situation in which it is the Court which purports to acquire jurisdiction of the non-resident plaintiffs by "a mere assertion of its own power."

2. The Due Process Clause Prohibits Kansas From Binding This Non-Resident Defendant On Claims Of Non-Residents Which Arose Outside Of The Forum State.

Assertion of jurisdiction over a non-resident defendant is permissible only after a careful assessment of "the relationship among the defendant, the forum, and the litigation." *Rush v. Savchuk*, 444 U.S. 320, 327 (1980). In the case now at hand, with respect to the claims of the non-resident plaintiffs, no nexus exists between the forum, the defendant and the litigation. Absent some affiliating circumstance between non-resident plaintiffs, their claims and the forum, the due process clause should prevent a binding judgment from being entered against Phillips.

To bind Phillips on the claims of non-resident plaintiffs, jurisdiction over Phillips need be evaluated on the basis of *International Shoe* and its progeny. With respect to these claims, the minimum contacts between Phillips, this forum, and the litigation are not present. Since the non-resident plaintiffs have not chosen Kansas as the forum, the mere presence of the litigation in this particular forum does not provide a necessary connection. Kansas has no particular interest in resolving these claims of non-residents. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). No evidence or witnesses related to the non-residents' claims are located in Kansas. *Id.* 355 U.S. at 223-24. Kansas has no interest in regulating the conduct of this non-resident defendant vis a vis its out of state dealings with non-residents. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950). The cause of action did not arise as the result of actions of the defendant in this forum. *Hanson v. Denckla*, 357 U.S. 235, 251-53 (1958).

Allowing the non-residents' claims to be litigated here in Kansas denies Phillips any "degree of predictability" which would allow Phillips "to structure their primary conduct with some assurance as to where that conduct will or will not render them liable to suit." *World-Wide Volkswagen v. Woodson*, 444 U.S. at 297. Phillips could not have reasonably anticipated being haled into the Kansas courts to defend claims of non-residents arising from leases located in other states.

3. The Court Should Grant Review To Address The "Common Fund" Issue Raised In This Case And Not In Gillette.

The Kansas Supreme Court in *Shutts v. Phillips Petroleum Co.* held that the case was "closely analogous" to the "common fund" cases of *Carpenter v. Pacific Mutual Life Insurance Co.*, 10 Cal. 2d 307, 74 P.2d 761 (1937), *aff'd sub nom., Neblett v. Carpenter*, 305 U.S. 297, *reh'g denied*, 305 U.S. 675 (1939); *Sovereign Camp of Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915), and *Supreme Council Royal Arcanum v. Green*, 237 U.S. 531 (1915). 222 Kan. at 552, 567 P.2d at 1311.[10] Presumably, this reasoning utilized by the Kansas Supreme Court in the prior case involving interest on additional royalties was utilized by the Kansas Supreme Court in this case in deciding not to require decertification of the non-resident class.

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10. Compare this statement to the statement of the Kansas Supreme Court in which the Court correctly indicated that these claims could not be aggregated for federal jurisdictional purposes. 222 Kan. at 545, 567 P.2d at 1306.

The Kansas Supreme Court's extension of these cases to encompass the present factual situation is perplexing. In the prior similar class action cases, the Court clearly held that no discrete "fund" existed. The right of class members to recover on a claim for interest depended on whether the law of the various states recognized a right to the interest. Phillips recognizes that the claims of the plaintiffs may present some common questions within the meaning of the class action statutes. The fact that the claims of the class members are products of various states' laws, however, prevents the claims of the class members from being "common" in the sense utilized in the earlier "common fund" cases. Were there actually claims to a "common fund," aggregation of the claims may be permissible for federal court jurisdictional purposes. *See Snyder v. Harris*, 394 U.S. 332, 335 (1969). Notwithstanding the fact that there was no commonly created right to this nonexistent fund, the Kansas Supreme Court utilized the "common fund" cases to support their holding.

In utilizing these precedents, not only has the Kansas Supreme Court attempted to force this case into a mold into which it simply will not fit, but the Kansas Supreme Court has also failed to recognize that in the various common fund cases the strength of the affiliating circumstances between the defendant, the forum, and the litigation were the decisive factor. In those common fund cases, the binding judgment was decided in the state of incorporation of the defendant. Those causes of action arose and were determined by the laws of the forum state, and in the state which had the most significant interest in the dispute. Indeed, this Court in *Hartford Life Ins. Co. v. Ibs* explicitly held that a class action of this nature "should be brought in a court of the state where the company was chartered and where the monetary fund was kept." 237

U.S. at 672.[11] The Kansas Supreme Court's approach, however, requires only that one party having a claim in common without others be a resident of the forum state. Out of this commonality of separate claims a purely fictional common fund is held to exist.

The Kansas Supreme Court's approach, logically extended, could result in all cases falling within the "common fund" rule. Any judgment rendered against a defendant in favor of a class could constitute a "common fund." If similar claims, arising under any number of states' laws, could be aggregated to create a fictional fund, then the narrow jurisdictional exception created by these cases swallows the general rule.

The Court should hear this case so as to consider whether this "quasi-common fund" notion formulated by the Kansas Supreme Court passes constitutional muster.

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11. In this case, if the individual claims can be aggregated to create a quasi-common fund, the situs of that fund must be in Oklahoma, where the decisions which controlled the use of the reserves were made. See 222 Kan. at 560, 567 P.2d at 1316.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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